Supreme Court, U.S.
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95 1068 JAN 2 - 1996

No. 95- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

JOHN D. LUTHER,
Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial Circuit

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PETITION FOR A WRIT OF CERTIORARI

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January 2, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

48 pp

QUESTION PRESENTED

Whether the Illinois Court of Appeals erred when it removed petitioner's claim of contributory negligence under the FELA from the jury's consideration after determining that respondent had not "added new dangers" to existing work conditions, rather than permitting the jury to scrutinize respondent's conduct under an "ordinary reasonableness" standard.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The only parties to this proceeding are the petitioner Norfolk and Western Railway Company and the respondent John D. Luther.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Norfolk and Western Railway Company states that it is a subsidiary of the Norfolk Southern Company.

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No. 95-———

NORFOLK AND WESTERN RAILWAY COMPANY,
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Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth Judicial Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norfolk and Western Railway Company respectfully requests that a writ of certiorari issue to review the judgment and decision of the Appellate Court of Illinois, Fifth Judicial District.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fifth District (App. at 1a-20a) is reported at 649 N.E.2d 1000. The order of the Illinois Supreme Court (App. at 21a) denying petitioner's petition for leave to appeal is not reported. The judgment of the Circuit Court, Third Judicial Circuit, Madison County, Illinois against petitioner entered upon a jury's verdict (App. at 22a-23a) is not reported. The order of the Circuit Court, Third Judicial

Circuit, Madison County, Illinois (App. at 24a), denying petitioner's post-trial motions, is not reported.

JURISDICTION

The decision of the Appellate Court of Illinois, Fifth Judicial Circuit, was filed on May 11, 1995. App. at 1a-20a. The Illinois Supreme Court entered its Order Denying Petition for Leave to Appeal on October 4, 1995. App. at 21a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Section 1 of the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 et seq., provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51; see also 45 U.S.C. § 52.

Section 3 of the FELA, 45 U.S.C. § 53, provides in pertinent part:

> In all actions brought [on and after April 22, 1908] against any such common carrier by railroad under or by virtue of any of the provisions of this act . . . to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

Section 4 of the FELA, 45 U.S.C. § 54, provides in pertinent part:

> In any action brought against any common carrier under or by virtue of any of the provisions of this Act . . . to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

STATEMENT OF THE CASE

1. Respondent John D. Luther, an employee of petitioner Norfolk and Western Railway Company, was a track laborer for petitioner from 1979 until 1988. On August 12, 1988, he was assigned to a crew to replace defective and damaged rails on a main line in Jennings, Missouri. Although three to five laborers are normally assigned to such a crew, Luther was the only laborer assigned to cut rail on the morning of August 12.

He and the two other members of the crew boarded a high rail truck. A high rail truck can be operated on roadways and railroad tracks, and has a boom lifting device to pick up and move rails. Before leaving for the rail line, the crew loaded the truck bed with tools necessary to remove and replace rail, including bolts, spikes, and 20 pairs of angle bars. In addition, the truck bed contained a gasoline-powered rail saw, weighing approximately 40 to 50 pounds and equipped with a cutting wheel. In most situations the rail saw can readily be handled by one man. The truck bed also contained a storage box for the saw located at the front of the truck bed near the cab.

To remove a segment of defective rail, the rail is cut into a 10-foot-long section using the rail saw. The rail is then cut into three pieces, each piece weighing approximately 110 to 132 pounds. Those pieces are then loaded

into the truck bed using the boom lifting device. On the morning of the incident giving rise to respondent's claims, the crew spent approximately 1 to 1½ hours cutting and replacing rail at each defective rail site.

While preparing to move to a new job site, respondent and another member of the crew loaded the rail saw into the truck bed. Respondent climbed onto the back of the truck bed, and the other crew member handed him the saw from the ground below. The truck bed now contained between 8 and 10 pieces of defective rail, tools, angle bars and other debris. Although no explicit safety policy requires the crew to clean up the truck bed, all three members of the crew, including respondent, testified that it is the laborers' responsibility to keep the truck bed clean and orderly. Laborers certainly do not need explicit directives in order to move items for the purpose of straightening up the contents in the truck bed. Before grabbing the saw to put it away, respondent had not cleared a path to the storage box or cleared a spot on which to lay the saw. As he held the saw, respondent searched for a suitable place to put the saw down. He did not want to place the saw on the other tools and debris because he was concerned that its blades might chip. Respondent finally observed a vacant spot at the front of the cab near the storage box; however, there was no clear path to reach it. Respondent navigated his way to within about two feet of the clearing and reached out to place the saw down. As he reached out, and started putting the saw down he felt a pain in his back and fell to his knees. He did not slip or trip in any way. Respondent was taken to the hospital where he was diagnosed with a pre-existing degenerative disk disease in his back, which apparently was aggravated by the incident with the saw.

2. Respondent filed suit in the Circuit Court of Madison County, Illinois under Section 1 of the FELA, 45 U.S.C. § 51, alleging that his back injury resulted from petitioner's negligence. The FELA creates a cause of action for injuries suffered by a railroad employee as a

result of the railroad's negligence. As it relates to the case in this Court, respondent's cause of action was premised on ordinary negligence under the FELA. In its answer, petitioner raised the affirmative defense of contributory negligence under Section 3 of the FELA, 45 U.S.C. § 53. Section 3 provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53.

At the close of all the evidence, respondent filed a motion for a directed verdict regarding the defense of contributory negligence, arguing that the evidence was insufficient to create a jury question on that issue. The motion also claimed that petitioner's evidence only proved assumption of risk, a defense barred under Section 4 of the FELA. See 45 U.S.C. § 54.

In fact, during trial, petitioner had proved that respondent was aware of, created, or contributed to the creation of the conditions which resulted in his injury. Furthermore, the evidence showed that respondent could have avoided the dangerous condition by taking a few simple and reasonable precautions before accepting the saw from his fellow crew member. The trial court, however, granted respondent's motion and denied petitioner's motion to reconsider on the issue of contributory negligence. Thus, contributory negligence was withheld from the jury's consideration.

On November 3, 1992, the jury returned a verdict and awarded respondent $1,850,000.00, reduced by 15% for respondent's failure to mitigate damages. Judgment was entered against petitioner on November 5, 1992. On July 8, 1993, the Third Judicial Circuit denied petitioner's post-trial motions.

3. On May 11, 1995, the Fifth Judicial District of the Appellate Court of Illinois affirmed, by a vote of 2-1, both the directed verdict on the issue of petitioner's contribu-

tory negligence and the jury verdict. In reviewing the directed verdict on the contributory negligence defense, the Appellate Court, quoting the Illinois Supreme Court's decision in *Uhrhan* v. *Union Pac. R.R.*, 617 N.E.2d 1182, 1187 (Ill. 1993), defined contributory negligence as "a careless act or omission on the plaintiff's part tending to add *new* dangers to conditions that the employer negligently created or permitted to exist." App. at 6a (emphasis added by the Appellate Court).

Although the court explicitly recognized that a defendant "is entitled to a contributory negligence instruction if there is any evidence to support that theory," *Gish* v. *CSX Transp. Co.*, 890 F.2d 989, 992 (7th Cir. 1989); *Uhrhan v. Union Pac. R.R.*, 617 N.E.2d 1182, 1187 (Ill. 1993), the Appellate Court held that there was no evidence that respondent's acts or omissions added additional dangers to the existing situation. App. at 8a. The court reasoned that because "there were no safety rules requiring laborers to clean the truck bed," the respondent could not have avoided the hazardous condition, and, therefore, did not add a new danger. *Id.*

The dissenting judge disagreed with the majority primarily because the court subjected the defendant and plaintiff to two different standards of care. The dissent was particularly concerned that the disparate standards provided the court with a way to "remove the issue of contributory negligence from consideration by a jury." App. at 17a-18a. The dissent also noted that the plaintiff was clearly negligent; indeed, but for the plaintiff's careless acts the accident never would have occurred. App. at 16a-17a.

The Illinois Supreme Court denied review on October 4, 1995. App. at 21a.

REASONS FOR GRANTING THE PETITION

This case is the most recent in a recurring set of decisions handed down by federal and state courts, which are sharply divided as to the proper legal standard for contributory negligence under the FELA. Specifically, the issue in this case is whether the Illinois state court erred when it removed the defendant's claim of contributory negligence from the jury's consideration after determining that the plaintiff had not "added new dangers" to existing work conditions, rather than permitting the jury to scrutinize the plaintiff's conduct for comparative negligence purposes under the traditional "reasonably prudent" person standard for negligence. See App. at 8a. The decision below singularly illustrates the fundamental issue that is at the heart of the split among the lower courts, and the concrete impact that this dispute is having on the jury's role in assessing employer liability under the FELA. This case therefore presents particularly compelling reasons for granting certiorari.

1. The federal circuit courts are hopelessly split on the precise issue which is raised in this case. In the Seventh, Eighth, Ninth, and Tenth Circuits, a contributory negligence claim under the FELA is submitted to the jury only after the court finds "a careless act or omission on the plaintiff's part tending to *add new dangers* to conditions that the employer negligently created or permitted to exist." *Taylor* v. *Burlington N.R.R.*, 787 F.2d 1309, 1316 (9th Cir. 1986) (emphasis added); see also *Tersiner* v. *Union Pac. R.R.*, No. 90-3361, 1991 WL 225897 (10th Cir. Oct. 30, 1991) (unpublished decision); *Gish* v. *CSX Transp., Inc.*, 890 F.2d 989, 991 (7th Cir. 1989); *Birchem* v. *Burlington N.R.R.*, 812 F.2d 1047, 1049 (8th Cir. 1987). In the Third Circuit the contributory negligence instruction employs the "ordinary reasonableness" standard in evaluating the plaintiff's conduct. But, a contributory negligence claim is not submitted to the jury if the court determines that the employer directed the employee to perform the injury causing task. *Fas-*

hauer v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1280 (3d Cir. 1995). The Fifth and Sixth Circuits permit the jury to assess all of the plaintiff's conduct under a "reasonably prudent person" standard. *Tipton* v. *CSX Transp., Inc.*, No. 91-3333, 1992 WL 43540 (6th Cir. Mar. 9, 1992) (unpublished decision); *Kendrick* v. *Illinois Cent. Gulf R.R.*, 669 F.2d 341, 343-44 & n.1 (5th Cir. 1982); *Page* v. *St. Louis Southwestern Ry.*, 349 F.2d 820, 823-24 (5th Cir. 1965).

Because federal substantive law applies under the FELA, *St. Louis Southwestern Ry.* v. *Dickerson*, 470 U.S. 409, 411 (1985), state courts also adopt either the "additional new dangers" standard or an "ordinary reasonableness" standard. Compare *Higgins* v. *CSX Transp., Inc.*, 455 S.E.2d 129, 131 (Ga. Ct. App. 1995) (adopting "add[itional] new dangers" standard); *Norfolk & W. Ry.* v. *Hodges*, 448 S.E.2d 592, 596 (Va. 1994) (same); *Uhrhan* v. *Union Pac. R.R.*, 617 N.E.2d 1182, 1187 (Ill. 1993) (same); *Kalanick* v. *Burlington N.R.R.*, 788 P.2d 901, 904-05 (Mont. 1990) (same) with *Drury* v. *Missouri Pac. R.R.*, 905 S.W.2d 138, 149 (Mo. Ct. App. E.D. 1995) (adopting "due care" standard); *Eversole* v. *Consolidated Rail Corp.*, 551 N.E.2d 846, 851-52 (Ind. Ct. App. 1990) (adopting "ordinary prudence" standard); *Narusiewicz* v. *Burlington N.R.R.*, 391 N.W.2d 895, 897 (Minn. Ct. App. 1986) (adopting "due care" standard). Recent decisions thus reflect profound differences in opinion among both state and federal courts, resulting in an array of inconsistent decisions concerning the correct standard for making contributory negligence a jury issue. As the dissent plainly reveals in this case, the standard applied can dramatically affect liability. App. at 16a-20a.

"[T]his Court is the only body capable of resolving conflicts among the various lower courts." *Novack Inv. Co.* v. *Setser*, 454 U.S. 1064-65 (1981) (White, J., dissenting from the denial of certiorari). Indeed, "[a] prin-

cipal purpose for which [this Court uses its] certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991). Review by the Court is especially crucial in this case because "the right to trial by jury is too substantial a part of the rights accorded by [the FELA]" to permit some courts to remove the issue of contributory negligence from the jury's consideration. See *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (holding that a state procedural rule that permitted the judge rather than the jury to resolve factual questions was not permissible under the FELA); *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 509-10 (1957) (jury determinations are an integral part of the FELA's statutory scheme).

But the availability of a jury for contributory negligence in a particular FELA case now depends primarily on geography. In one jurisdiction the plaintiff will not be held accountable for his failure to perform his job safely, see, *e.g.*, *Birchem*, 812 F.2d at 1047 (knowing use of defective equipment is not sufficient to create jury question as to contributory negligence); *Rivera* v. *Farrell Lines, Inc.*, 474 F.2d 255, 258 (2d Cir. 1973) (failure to clean up or avoid spill which caused fall is not sufficient to create jury question), *cert. denied*, 414 U.S. 822 (1973); App. at 6a-9a (failure to clean truck bed in order for plaintiff safely to position himself is not sufficient to create jury question); *Pruett* v. *Norfolk & W. Ry.*, 632 N.E.2d 652, 655 (Ill. Ct. App. 1994) (forcing defective switch into place while experiencing back pain is not sufficient to create jury question); while in another court he will, see, *e.g.*, *Tipton*, 1992 WL 43540, at **4 (failure to reduce the weight of trashbags before lifting them is evidence of contributory negligence); *Fashauer*, 57 F.3d at 1280-81 (jury may assess the manner in which plaintiff walked on wet surface and whether or not plaintiff "act[ed] with due care"); *Higgins* v. *CSX Transp., Inc.*, 455 S.E.2d 129, 131 (Ga. Ct. App. 1995)

(plaintiff's failure to position himself safely *while cutting* down tree is evidence of contributory negligence); *Monroe* v. *Southern Ry.*, 436 S.E.2d 568, 570 (Ga. Ct. App. 1993) (failure to wear "ice creepers" on ice is evidence of contributory negligence). Accordingly, the Court should resolve the conflict among the lower courts and decide the proper standard for contributory negligence.

2. The split among the federal appellate courts, and the resulting disarray throughout the lower courts, stems from some of those courts' improper and inconsistent attempts to reconcile the doctrines of assumption of the risk and contributory negligence within the FELA's statutory framework. Thus, guidance as to the proper interplay between these two doctrines would unify the decisional law in this area, and restore faithful judicial compliance to the FELA's comparative negligence scheme.

In 1908, Congress enacted the FELA to provide a remedy for railroad employees injured as a result of their employers' negligence. With the enactment of the FELA, Congress codified the notion of pure comparative negligence in order to ameliorate the harsh consequences and perceived unfairness of the compete bar to recovery associated with traditional contributory negligence. Mary J. Davis, *Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability*, 39 Vill. L. Rev. 281 (1994). The courts, however, continued to apply the doctrine of assumption of risk to bar recovery. See, *e.g.*, *Seaboard Air Line Ry.* v. *Horton*, 233 U.S. 492 (1914). Because of the difficulty in distinguishing assumption of risk from contributory negligence, and the perceived inequities of a complete bar to recovery, in 1939 Congress amended the FELA to abolish assumption of risk as a basis for denying all recovery to a railroad employee. *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 58 (1943). Although this Court instructed lower courts to treat the FELA claims "as though no doctrine of assumption of risk had ever existed," *id.* at 64, some courts continue improperly to inject that con-

cept into their comparative negligence analyses in a variety of ways.

Upon receiving a defendant's claim of contributory negligence, the Seventh, Eighth, Ninth, and Tenth Circuits initially classify the plaintiff's conduct as either "assumption of risk" or "contributory negligence" depending on whether the "careless act or omission on the plaintiff's part tend[ed] to *add new dangers* to conditions that the employer negligently created or permitted to exist." *Taylor*, 787 F.2d at 1316; see also *Tersiner*, 1991 WL 225897, at **2; *Gish*, 890 F.2d at 991; *Birchem*, 812 F.2d at 1049. If the court decides that a plaintiff has not added new dangers, then the jury is not to be instructed as to the contributory negligence claim. Instead, those courts hold that the defendant is improperly raising an assumption of risk claim. Thus, the railroad is held 100% accountable for the injury. Within this framework, a court completely disposes of a defendant's contributory negligence claim in direct contravention of this Court's instruction that "[n]o case is to be withheld from a jury on any theory of assumption of risk." *Tiller*, 318 U.S. at 67.

The Third Circuit generally submits the issue of contributory negligence to the jury under a "reasonably prudent person" standard. But the Third Circuit's approach still considers the doctrine of assumption of risk. In the Third Circuit, a contributory negligence claim will not go to the jury if the claim is based on the allegation that the plaintiff accepted dangerous employment or performed in a manner that the employer directed, "regardless of whether the plaintiff acted reasonably or unreasonably" by accepting or performing the job. *Fashauer*, 57 F.3d at 1280. All other conduct is submitted to the jury under a traditional reasonableness standard. *Id.* In this case petitioner did not direct respondent's actions and therefore the issue would have been submitted to the jury if the case had arisen in Pennsylvania, New Jersey, or Delaware.

The Fifth and Sixth Circuits apply a straightforward reasonableness standard to every aspect of the plaintiff's conduct, including the choice of whether and how to perform a hazardous task. *Tipton*, 1992 WL 43540, at **2-**4; *Page* v. *St. Louis Southwestern Ry.*, 349 F.2d 820, 823-24 (5th Cir. 1965). For example, an employee who fails to avail himself of the safest alternative while performing a dangerous task may be accountable for contributory negligence if the jury finds that choice was unreasonable. See, *e.g.*, *Tipton*, 1992 WL 43540, at **4; *Eversole* v. *Consolidated Rail Corp.*, 551 N.E.2d 846, 851 (Ind. Ct. App. 1990). If, on the other hand, an employee has no choice but to perform a dangerous task in a particular way, and that task does not entail extraordinary risk, the jury likely will find that the employee's decision to perform the job was reasonable. See, *e.g.*, *Groves* v. *Illinois Cent. Gulf R.R.*, 563 So. 2d 496, 498-99 (La. Ct. App. 1990). A plaintiff may still be held contributorily negligent for unreasonably assuming a risk.[1] In either event the jury is not arbitrarily prevented from considering contributory negligence and therefore can fairly allocate fault between the parties. This approach reconciles the FELA's assumption of risk preclusion with its comparative negligence.[2] See David R. Owen & J. Marks Moore, *Comparative Negligence in Maritime Personal Injury Cases*, 43 La. L. Rev. 941, 951 (1983).

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[1] Although the Ninth Circuit uses the "additional new dangers" standard, it also has suggested that a plaintiff may be contributorily negligent for assuming extraordinary risks. *Jenkins* v. *Union Pac. R.R.*, 22 F.3d 206, 211 (9th Cir. 1994); *Taylor* v. *Burlington N.R.R.*, 787 F.2d 1309, 1316 (9th Cir. 1986).

[2] This straightforward comparison of the plaintiff's and defendant's fault is not unprecedented in the comparative negligence arena. *See, e.g., Uniform Comparative Fault Act* § 1(b), 12 U.L.A., Civ. Proc. & Remedial Laws 45 (Supp. 1995) (comparative fault under the act includes "unreasonable assumption of risk"); *Harrison* v. *Taylor*, 768 P.2d 1321, 1328-29 (Idaho 1989); *Hilen* v. *Hays*, 673 S.W.2d 713, 718-20 (Ky. 1984).

In sum, the approach followed in the Fifth and Sixth Circuits is simple, coherent, and complies with this Court's instruction to treat the doctrine of assumption of risk as though it never existed. *Tiller*, 318 U.S. at 64. This Court should therefore grant certiorari and embrace the approach followed in the Fifth and Sixth Circuits.

3. By applying the "additional new dangers" test in this case, the Illinois Court of Appeals was not faithful to the FELA's plain language or purpose because the court subjected the plaintiff and the defendant to two different standards of negligence. Holding the defendant to an ordinary negligence standard, while simultaneously refusing to submit the issue of plaintiff's negligence to the jury absent a showing that the plaintiff's "careless act or omission . . . add[ed] new dangers," clearly involves use of disparate negligence standards that is unsupported by anything in the statute.

The FELA provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. The plain language of the FELA "does not distinguish between degrees of negligence." *Fashauer* v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995); *Page*, 349 F.2d at 824. Moreover, the provision, read as a whole, does not change the standard for assessing contributory negligence; it merely describes the effects that a successful contributory negligence claim has on recovery. The 1939 amendment which abolished assumption of the risk similarly does not distinguish between degrees of negligence: "[An injured] employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or em-

ployees of such carrier." 45 U.S.C. § 54. The natural reading of § 54's "whole or in part" language suggests that if there is *any* negligence on the part of an employee, including the injured employee, the injured employee shall not be deemed to have assumed the risk. Thus, the amendment "was clearly aimed at making the principles of comparative negligence the guiding rules of decision in accident cases." *Tiller*, 318 U.S. at 65.

The FELA's comparative negligence scheme was intended equitably to apportion employer-employee responsibilities. *Id.; Kernan* v. *American Dredging Co.*, 355 U.S. 426, 438 (1958); *Page*, 349 F.2d at 824. Congress intended " 'the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in light of the comparison, do justice to all concerned.' " *Tiller*, 318 U.S. at 65 (quoting Hearings on S. 1708, Subcommittee of the Senate Judiciary Committee, 76th Cong., 1st Sess. 78 (1939)). Moreover, a pure comparative negligence scheme accounts for degrees of negligence by design. Accordingly, subjecting the parties to different threshold standards undermines the pure comparative negligence scheme embodied in the FELA. *Page*, 349 F.2d at 824; *Fashauer*, 57 F.3d at 1282-83; see also *Gavagan* v. *United States*, 955 F.2d 1016, 1019 n.7 (5th Cir. 1992) (affirming jury instruction applying same standards of care under Jones Act's comparative negligence scheme); *Karvelis* v. *Constellation Lines S.A.*, 806 F.2d 49, 53 nn.1 & 2 (2d Cir. 1986) (same), *cert. denied*, 481 U.S. 1015 (1987); *Brown* v. *OMI Corp.*, 863 F. Supp. 169 (S.D.N.Y. 1994) (refusing to apply different standards of care under Jones Act, 46 U.S.C.A. § 688 et seq.); *Bunting* v. *Sun Co.*, 643 A.2d 1085, 1089 (Pa. Super. Ct. 1994) (same).

Finally, as the facts in this case plainly illustrate, the "additional new dangers" test diminishes the safety incentives that are at the heart of the FELA's enactment. See generally *Page*, 349 F.2d at 824 ("[I]t is difficult to

see how safety is enhanced if the standard of performance by the injured worker is lowered."); Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 San Diego L. Rev. 49 (1988) (pure comparative fault aspect of the FELA serves as an incentive to employee safety). In the case at bar, respondent was unquestionably capable of clearing a space on the truck bed in order safely to put down the rail saw. His conduct thus creates a fact question as to whether he acted reasonably under the circumstances. If his actions were not reasonable, as the dissenting judge found, then respondent's recovery (which is breathtaking in magnitude) should have been reduced by his proportionate fault. At a minimum, the issue should have been submitted to the jury with a standard negligence instruction. But based on the suspect "additional new dangers" standard, the court below removed that issue from the jury and deprived petitioner of a significant basis upon which to reduce the verdict against it.

Sixty years is long enough to allow the issue of the meaning of contributory negligence under the FELA to "percolate" in the lower courts. The time has come for the Court to determine how properly to apply the comparative negligence standard in Section 3 of the FELA in a way that is consistent with the elimination of the doctrine of assumption of risk. The decision below provides a perfect vehicle by which to resolve the decisional conflict on this issue. Accordingly, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2, 1996

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